Supreme Court, U.S.
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Case No. 85-1227

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROY P. BRIEHLER,
PETITIONER,

v.

SYLVIA'S INC., a Rhode Island corporation, WILLIAM BURGIN, JOSEPH PERRY, DAVID F. FOX, ROBERT M. SILVA, LTD., DENNIS TABER, POSEIDON VENTURE, INC. a Rhode Island corporation, and JERRY L. McINTYRE,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

KATHLEEN MANAGHAN
CORCORAN, PECKHAM & HAYES P.C.
61 Long Wharf
Newport, Rhode Island 02840
(401) 847-0872
Counsel for Respondent, Dennis Taber

Blanchard Press, Inc., Boston, Mass.—Law Printers (617) 426-6660

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I

QUESTIONS PRESENTED

1. Does this Petition involve a question of gravity and general importance and/or a question on which the Circuit Courts are in conflict, which would justify this Court in granting the Writ?

2. Did the Circuit Court of Appeals err in upholding a decision of the District Court dismissing Plaintiff's Complaint?

3. Did the Circuit Court of Appeals err in upholding a decision of the District Court denying Plaintiff's Motion for a change of venue?

TABLE OF CONTENTS

	Page
Questions Presented	I
Table of Contents	III
Index of Authorities Cited	IV
Proceedings Below	1
Statement Concerning Jurisdiction	3
Statutes and Constitutional Provisions Involved	3
Statement of the Case	4
Reasons Why Writ Should Be Denied	6
Argument	6
I. This Petition Does Not Present Constitutional or Federal Questions of Such Gravity or General Importance as to Merit Review by This Court Nor is There Any Conflict Between Circuits on Any of Questions Presented	6
II. The Court of Appeals Ruled Correctly in Affirming the District Court's Dismissal of Plaintiff's Complaint Pursuant to Federal Rule of Procedure 41(b)	8
1. Briehler's Inability to Obtain Counsel for the Corporate Plaintiffs	9
2. Briehler's Refusal to Enter the State of Rhode Island	10
3. Briehler's Failure to Appear at the November, 1984 Settlement Conferences	10
III. The Circuit Court Did Not Err in Affirming the Denial By the District Court of Petitioner's Motion for a Change of Venue	11
Conclusion	13

TABLE OF AUTHORITIES

Page

Cases

Aetna Casualty and Surety Company v. *Singer-General Precision, Inc.*, 323 F. Supp. 1141 (D. Del. 1971) 12

Bottos v. *Pivarnik*, 98 F.R.D. 416 (N.D. Ind. 1982) *aff'd* 714 F.2d 147 (7th Cir. 1983) 10

Roy P. Briehler, Briehler Properties, Inc., Roy P. Briehler of New Jersey Inc., and Katherine Worthington v. *Poseidon Venture Inc., William Burgin, Sylvia's Inc., and Jerry McIntyre*, (January 1986) #84-188 Appeal .. 4

Commissioner v. *Bilder*, 369 U.S. 499, 8 L.Ed.2d 65, 82 S.Ct. 881 (1962) 7

Fields v. *United States*, 205 U.S. 292, 51 L.Ed. 807, 27 S.Ct. 543 (1907) 7

Hoffman v. *Blaski*, 363 U.S. 335, 4 L.Ed.2d 1254, 80 S.Ct. 1084 (1960) 12

In Re Victor Publishers, Inc., 545 F.2d 285, 286 (1976) .. 9, 10

Link v. *Wabash Railroad Company*, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962) 7, 8

Schaeffer v. *Warehouse Employees Union Local No. 730* 408, F.2d 204, 132 U.S. App. D.C. 401 *certiorari den.* 395 U.S. 934, 23 L.Ed.2d 449, 89 S.Ct. 1996 (CA 1969) 9

United States v. *Johnston*, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925) 7

Wurzburgher, Morrow and Keough, Inc. v. *Keystone Company of Boston*, 361 F. Supp. 637 (D. Mass. 1973) 12

Statutes

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1404(a) 3, 11, 12

Rules of Federal Procedure

Federal Rule of Civil Procedure 41(b) 2, 3, 7, 8

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RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Dennis Taber, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the First Circuit Court of Appeals.

Proceedings Below

In March, 1983, Petitioner Roy P. Briehler filed a complaint in the Federal District Court for the District of Rhode Island,

naming as Defendants, Sylvia's Inc., Joseph Perry, Robert Bryer, William Burgin, Poseidon Venture, Inc., attorneys David F. Fox, Robert M. Silva, Ltd. and Jerry L. McIntyre, and Dennis M. Taber. Dennis M. Taber is a Constable qualified to serve process in both the Federal and State Courts in Rhode Island. Shortly thereafter, Petitioner's complaint was amended to add as parties Plaintiff, Briehler Properties, Inc. and Roy Briehler's of New Jersey, Inc.

Thereafter, discovery ensued, resulting in a settlement conference held in the chambers of Senior District Judge Raymond Pettine on December 2, 1983. At his direction, additional settlement conferences were held amongst the parties which were unsuccessful. On November 4, 1984, Petitioner filed a Motion seeking to have the venue of the case changed to New Jersey. That Motion was denied by District Court Judge Raymond Pettine on November 27, 1984. Thereafter, an additional settlement conference was noticed before Magistrate Jacob Hagopian, to be held on November 14, 1984. All parties were noticed. Although counsel for all Defendants appeared, Petitioner did not appear, nor did any counsel appear on his behalf. The settlement conference was re-scheduled for November 19, 1984, but Petitioner again failed to appear. An attorney, Manuel Kyriakakis did appear, but with no knowledge of the litigation, no settlement authority and no intention at that time to file an appearance on Petitioner's behalf. (See *Petition for Writ of Certiorari*, Appendix, A-25 through A-27). Thereafter, Magistrate Hagopian formally recommended to Judge Pettine that Petitioner's complaint be dismissed pursuant to Federal Rule of Civil Procedure 41(b). That recommendation was accepted by Judge Pettine in an Opinion and Order, dated May 17, 1985.

Petitioner filed a timely appeal to the U.S. Court of Appeals for the First Circuit of Judge Pettine's Order of Dismissal and of his Order denying Petitioner's Motion for a change of venue. On September 12, 1985, the First Circuit Court of Appeals

affirmed both Orders of the United States District Court. On October 24, 1985, the First Circuit of Appeals denied Petitioner's Motion for a re-hearing.

Jurisdiction

Jurisdiction is provided to this Court to consider this Petition pursuant to the provisions of 28 U.S.C. § 1254(1) which provides as follows:

> § 1254 Courts of Appeals; Certiorari; Appeal; Certified Questions
>
> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; . . .

Statutes And Constitutional Provisions Involved

Respondent denies that this case involves the denial of a right protected by the Constitution of the United States.

28 U.S.C. § 1404(a) provides as follows:

> For the convenience of parties and witnesses in the interest of justice, a District Court may transfer any civil action to any other District or Division where it might have been brought.

Rules Of Federal Procedure

Federal Rule of Civil Procedure 41(b) provides as follows:

> Involuntary dismissal: Effect thereof—
> For failure of the Plaintiff to prosecute or to comply with these rules or any order of Court, a Defendant may move for dismissal of an action or of any claim against him . . .

> Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision or any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Statement of the Case

This litigation results from a Constable's sale, held in Jamestown, Rhode Island, on February 26, 1983, to satisfy an unpaid Rhode Island State District Court Judgment in favor of Sylvia's Inc. and against Roy P. Briehler and another corporation not a party to the current action. Attorney and Respondent David Fox, of the law office of Robert M. Silva, Ltd. represented Respondent Sylvia's Inc. in that litigation. The subject of the Constable's sale was a ferry boat, allegedly held in the name of Roy P. Briehler and/or other corporate Plaintiffs, and was conducted by Constable and Respondent Dennis M. Taber pursuant to a state district court order. The high bidder at that auction was Respondent William Burgin, who later conveyed ownership of the vessel to himself and Respondent Jerry McIntyre d/b/a Poseidon Venture, Inc. Briehler, claiming countless errors in the noticing and conduct of that Constable's sale and in the sale of the ferry boat to Burgin and McIntyre, brought not only this action but a nearly identical action in Rhode Island State Superior Court (*Roy P. Briehler, Briehler Properties, Inc., Roy P. Briehler of New Jersey Inc., and Katherine Worthington* v. *Poseidon Venture Inc., William Burgin, Sylvia's Inc., and Jerry McIntyre* [January 1986] # 84-188-Appeal). That action was tried to a Providence County jury in late 1983, and resulted in directed verdicts against Briehler and in favor of Defendants, verdicts which were affirmed by the Rhode Island Supreme Court in December, 1985.

Briehler has always represented himself in the federal action. The corporate Plaintiffs were initially represented by Rhode Island attorney, Raymund Sardut, who withdrew in May of 1984. Briehler was given 60 days to secure new counsel, but has never been able to do so, although he claims to have exhausted the Martindale-Hubbell listing of attorneys in Rhode Island. Six months later, a settlement conference was called before Magistrate Jacob Hagopian for November 14, 1984. All parties were noticed. The morning that the conference was to be held, Briehler telephoned the Magistrate, stating that he was in Florida and could not attend the conference due to the existence of an outstanding civil warrant for his arrest in Rhode Island. He asked to be contacted during the conference at either of two telephone booths. Magistrate Hagopian declined this method of conferencing. When defense counsel appeared on November 14, they were advised by the Magistrate that the conference had been re-scheduled for November 19, and that Briehler had been directed to appear on the new date.

On November 16, Briehler contacted the Magistrate's office to state again that he would not return to Rhode Island because of the warrant, and that he had not been able to retain counsel. He was nevertheless directed by the Magistrate either to appear personally or through counsel on November 19. On November 19, Briehler failed to appear, but attorney Manuel Kyriakakis was present on his behalf. Kyriakakis indicated he had been contacted late on the previous day to make his appearance, that he was unfamiliar with the case, had not decided whether to formally enter an appearance on behalf of Briehler and had no settlement authority. He later informed the Court in writing that he did not intend to enter his appearance on behalf of Briehler. (See *Petition for Writ of Certiorari*, A-25 through A-27). On the basis of the foregoing, the Magistrate concluded, in a recommendation to Judge Pettine, that the case be dismissed, that the Plaintiff "Briehler did not just fail

to appear because of some mistake or inadvertance, but considering the reasons communicated to the Court for his failure to appear, adamantly refused to appear" and as such had displayed a "reckless disregard for the Court's authority." The Magistrate therefore recommended that the Plaintiff's complaint be dismissed under Federal Rule of Procedure Rule 41(b), a recommendation that was accepted by Judge Pettine (See *Petition for Writ of Certiorari*, A-4 through A-23).

In that decision, Judge Pettine adopted the recommendations of the Magistrate on four grounds:

> 1. Briehler's continuing and expressly stated inability to secure counsel for the corporate Plaintiff's;
> 2. Briehler's unwillingness to come to Rhode Island due to the outstanding civil arrest warrant;
> 3. Briehler's willful failure to appear himself or through counsel at either of the November, 1984 settlement conferences;
> 4. The fact that Plaintiff's claims contained in the federal Complaint had been substantially litigated already in another forum.

On November 27, 1984, Judge Pettine had previously denied Briehler's Motion for a Change of Venue of the cause to the State of New Jersey.

REASONS WHY WRIT SHOULD BE DENIED

Argument

I. THIS PLTITION DOES NOT PRESENT CONSTITUTIONAL OR FEDERAL QUESTIONS OF SUCH GRAVITY OR GENERAL IMPORTANCE AS TO MERIT REVIEW BY THIS COURT NOR IS THERE ANY CONFLICT BETWEEN CIRCUITS ON ANY OF THE QUESTIONS PRESENTED.

In reviewing an opinion of a Court of Appeals, this Court has generally held that certiorari is in order when the follow-

ing circumstances pertain: the legal issues raised by the Petition involve questions of gravity and general importance; *Fields* v. *United States*, 205 U.S. 292, 51 L.Ed. 807, 27 S.Ct. 543 (1907) and/or the Petition reflects a conflict between state and Federal courts or Federal courts of different circuits concerning an important legal question. See *Fields* v. *United States, supra; Commissioner* v. *Bilder*, 369 U.S. 499, 8 L.Ed.2d 65, 82 S.Ct. 881 (1962).

Petitioner has not alleged any conflict between Federal circuit courts or between any Federal or state court as to the issues raised in his Petition.

In addition, Petitioner has not raised issues in his Brief of importance to any one but himself, though he has attempted to cast his Petition in terms of constitutional infringements by the Federal District Court for the State of Rhode Island and First Circuit Court of Appeals. In fact, this case raises no constitutional issues. It is tempting and in fact, probably frequently happens, for a Plaintiff whose case is dismissed prior to trial for procedural reasons, to claim a lack of due process. However, the authority of a Federal District Court Judge to dismiss a Plaintiff's complaint for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b) has been declared constitutional on a number of occasions, most notably in this Court's decision in *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962). This Petition represents nothing more than this Petitioner's continuing disagreement with the District Court's dismissal of his Complaint pursuant to that Rule. The validity of that Rule is not in question. Petitioner's challenge to the application of that Rule to his cause would require this Court—as was required of the First Circuit Court of Appeals—to review the factual findings of the District Court which resulted in dismissal of Petitioner's Complaint. This Court has previously stated that it will not do this. See *United States* v. *Johnston*, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925).

The same arguments apply equally with regard to this Petitioner's attempt to seek review by this Court of the denial by the District Court of his Motion for a change of venue. Petitioner's cavalier paragraph (See *Petition for Writ of Certiorari*, pp. 29-30) that denial for his Motion for a Change of Venue "sanctions the imposition of conditions upon the Petitioner which are not authorized by reason and by law and were not intended by the framers of the Federal Rules of Civil Procedure" does not even represent an attempt to provide this Court with any basis to review this venue ruling.

II. The Court Of Appeals Ruled Correctly In Affirming The District Court's Dismissal Of Plaintiff's Complaint Pursuant To Federal Rule Of Procedure 41(b).

Federal Rule of Procedure 41(b) provides for the involuntary dismissal of a Complaint for the failure of a Plaintiff to diligently prosecute it. Although the Rule refers to the filing of a Motion by a Defendant, it has been generally held that the Court itself may enter a Rule 41(b) dismissal *sua sponte* in an exercise of its discretion. See *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962). That case provided as follows:

> Neither the permissive language of the Rule—which merely authorizes a motion by the Defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of Courts acting on their own initiative to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a Court to dismiss *sua sponte*, for lack of prosecution, has generally been considered an "inherent power" governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. 370 U.S at 630-631, 82 S.Ct. at 1388 through 1389.

It is axiomatic that dismissal for want of prosecution lies in the discretion of the Court. See *Schaeffer* v. *Warehouse Employees Union Local No. 730*, 408 F.2d 204, 132 U.S. App. D.C. 401, *certiorari denied* 395 U.S. 934, 23 L.Ed.2d 449, 89 S.Ct. 1996 (CA 1969). The First Circuit of Appeals held, in considering Petitioner's appeal, that: "Under the circumstances of this case: Petitioner's failure to respond to Court Orders; the failure to obtain counsel for the corporate Plaintiffs; and his general refusal to come to Rhode Island to participate in pre-trial proceedings, we find no abuse of discretion in the judgment of dismissal" (See *Petition for Writ of Certiorari*, A-1 through A-2).

1. *Briehler's Inability to Obtain Counsel for the Corporate Plaintiffs.*

Although Briehler could represent himself *pro se* in Federal District Court, he could not, not being a member of the Rhode Island Bar, represent the corporate Plaintiffs. *In Re Victor Publishers, Inc.*, 545 F.2d 285, 286 (1976). (This Court should note that Petitioner has filed the instant Petition only in his own name, deleting the various corporate Plaintiffs who were parties in the District Court suit and appeal to the First Circuit). References in Briehler's brief filed with this Court describe the efforts he claims he took to secure such counsel. At page 6 of his Brief, Briehler says "over the next six months Plaintiff Briehler corresponded with every Rhode Island attorney and/or law firm listed in Martindale-Hubbell, in an effort to retain new counsel." Given the fact that there are 2,000 licensed members of the Rhode Island Bar, (Respondent presumes most if not all of them are listed in Martindale-Hubbell), this statement is difficult to believe. One suspects, assuming Briehler made an attempt to contact even one quarter of the Rhode Island licensed bar, that there may be reasons that he was unable to secure representation which he was unable or unwilling to state in his Brief. Nevertheless, as District Court

Judge Pettine stated in citing *In Re Victor Publishers Inc., supra*, an inability to secure such counsel on behalf of the corporate Plaintiffs, has been held to be satisfactory reason for a Rule 41(b) dismissal.

2. *Briehler's Refusal to Enter the State of Rhode Island.*

Not only was Briehler unable to secure counsel for the corporate Plaintiffs but he made it clear on a number of occasions that he was unwilling to come into the jurisdiction while there was a civil arrest warrant pending for him. Though Briehler's Brief challanges the legality of this warrant, by accusing some of the Defendants in the action of conspiring with the Town of Jamestown to bring it about, the sufficiency of that warrant never been legally questioned. It therefore became apparent that as long as the warrant is outstanding, Briehler's litigation could not proceed anywhere in Rhode Island, because Briehler would not appear and was unable to secure the services of a licensed attorney to prosecute the case in his absence. Even if he had such counsel, his personal attendance at settlement conferences or at trial was doubtful. Cited in the lower Court's decision is the case of *Bottos* v. *Pivarnik*, 98 F.R.D. 416 (N.D. Ind. 1982) *aff'd* 714 F.2d 147 (7th Cir. 1983), whereby a Rule 41(b) dismissal of Plaintiff's action was upheld, where the Plaintiff refused to enter the state of Indiana because of an outstanding arrest warrant.

3. *Briehler's Failure to Appear at the November, 1984 Settlement Conferences.*

The Magistrate scheduled two settlement conferences in November, 1984. In May of 1984, counsel for the corporate Plaintiffs had withdrawn his appearance. Briehler had been given an additional 60 days to secure replacement counsel. By November 14, 1984, when the first conference was scheduled, such counsel had not been obtained. Petitioner has complained

he did not receive written notice of that conference, but it is in fact true that none of the Defendant's counsel received written notice, all parties having been notified by telephone, from the District Court Clerk's Office. There has been no assertion by Petitioner that he did not receive oral notice of the two hearings, and in fact, the facts (his phone call to the Magistrate) would indicate otherwise. When Briehler did not appear at the first conference, a second was scheduled. On both occasions, defense counsel for all of the Defendants were present. On both occasions, Briehler declined to appear.

Briehler's Petition mentions the attendance of Katherine Worthington, a companion of Briehler's, and a Plaintiff in another Rhode Island District Court suit emanating from the same Constable's sale, who Briehler claims had authority to act in his behalf. Such a person could hardly satisfy the requirements of a settlement conference, as she was not the Plaintiff herself, nor was she licensed counsel who had entered an appearance. Even the attorney who appeared on November 19, Manuel Kyriakakis, was of no help to the Court, having no familiarity with the case, no settlement authority, and having not even decided at that time whether he would be entering an appearance on behalf of the Petitioner. In fact, he later declined to do so. Briehler had already told the Magistrate's Office that he had already contacted 500 members of the Rhode Island Bar Association to no avail. These circumstances made it very clear to the Magistrate that the case could not progress through the remaining discovery, Court sponsored settlement conferences, and ultimately to trial. He thereupon recommended dismissal to the Court.

III. The Circuit Court Did Not Err In Affirming The Denial By The District Court Of Petitioner's Motion For A Change Of Venue.

Petitioner's Motion for a Change of Venue is presumably based upon 28 U.S.C. § 1404(a), which provides that the venue

of a case may be changed for the convenience of parties and witnesses to another District where the action might also have been brought. That section gives the District Court the discretionary power to transfer a case to a different venue in appropriate circumstances. However, the moving party must show that the proposed transfer district is not merely equally convenient, but that it is more convenient. See *Wurzburgher, Morrow and Keough, Inc.* v. *Keystone Company of Boston*, 361 F. Supp. 637 (D. Mass. 1973). The moving party must demonstrate further that the factors strongly favor transfer. See *Aetna Casualty and Surety Company* v. *Singer-General Precision, Inc.*, 323 F. Supp. 1141 (D. Del. 1971).

In his Motion to the District Court, Petitioner mentioned the outstanding civil warrant for his arrest in the State of Rhode Island, and his New Jersey residence and business connections. He also vaguely alluded to a conspiracy involving every member of the Rhode Island Bar. He did not mention, but the Court was aware that all of the Defendants were Rhode Island residents and that the ferry boat in question was moored in Rhode Island. The Court also knew that the greatest number if not all of the material witnesses who would testify at trial were located in Rhode Island.

Finally and most importantly, Petitioner failed to prove that the proposed transferee district was one in which the action "might have been brought." A Court may not transfer an action to District Court in which Defendant is not subject to the personal jurisdiction of the transferee Court. See *Hoffman* v. *Blaski*, 363 U.S. 335, 4 L.Ed.2d 1254, 80 S.Ct. 1084 (1960). Since the Petitioner failed to prove that any of the Defendants were subject to the jurisdiction of the proposed transferee district, 28 U.S.C. § 1404(a) was not applicable; the District Court acted properly in denying his motion and the Court of Appeals acted properly in affirming this denial.

Conclusion

The Petition filed in this matter raises neither substantial constitutional issues of law, nor does it raise issues that have been disparately handled by the Circuit Courts and/or state courts. Petitioner has attempted to fashion constitutional issues out of a case which in fact raises none. The Federal District Court for the State of Rhode Island reviewed the factual travel of this case and the identity of the parties in its two rulings which are at issue here—the denial of a change of venue and the dismissal of the action itself. Its discretionary rulings on these factual points were appropriately upheld by the First Circuit Court of Appeals. Although the First Circuit opinion does not mention it, this Petitioner has in fact already had his day in Court in a Rhode Island state action in which virtually all of the issues raised in the Federal action as to the legal sufficiency of the Constable sale were raised. In the state cause, Petitioner was represented by competent legal counsel. Petitioner's prayers for relief in the state action were disposed of by directed verdicts entered on behalf of Defendants, which have been upheld on appeal. Petitioner has had his day in Court—this is reflected in the decision of Rhode Island Federal District Court Judge Pettine who referred in his decision dismissing Petitioner's Complaint to the preclusionary effects of the State Court action. (See *Petition for Writ of Certiorari* at pp. A-19 through A-22).

Respondent Dennis M. Taber therefore respectfully requests that Roy P. Briehler's Petition for Writ of Certiorari be denied.

Respectfully submitted,

KATHLEEN MANAGHAN
CORCORAN, PECKHAM & HAYES P.C.
61 Long Wharf
Newport, Rhode Island 02840
(401) 847-0872
Counsel for Respondent, Dennis M. Taber